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No. 08-289

In The
Supreme Court of the United States

THOMAS C. HORNE,
Superintendent, Arizona Public Instruction,

Petitioner,

v.

MIRIAM FLORES, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

By interpreting the phrase "appropriate action" under Section 204 of the Equal Education Opportunity Act ("EEOA") as a requirement that the State of Arizona provide for a minimum amount of funding specifically allocated fyor English Language Learner ("ELL") programs statewide, did the Ninth Circuit violate the doctrine prohibiting federal courts from usurping the discretionary power of state governments to determine how to appropriately manage and fund their public education systems?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
IDENTITY AND INTEREST OF AMICUS CURIAE	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	3
I. FEDERALISM IS A CORE COMPONENT OF LIMITED AND ETHICAL GOVERNMENT	4
II. The NINTH CIRCUIT VIOLATED PRINCIPLES OF FEDERALISM BY CONTROLLING A TRADITIONALLY LOCAL DECISION	6
A. THE TEXT OF THE EEOA REQUIRES THAT FEDERAL COURTS HAVE A LIMITED ROLE IN MATTERS OF SCHOOL FUNDING AND MANAGEMENT	6
B. THIS COURT'S PRECEDENT REQUIRES THAT FEDERAL COURTS HAVE A LIMITED ROLE IN MATTERS OF SCHOOL FUNDING AND MANAGEMENT	11
CONCLUSION	18

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Board of Education of Oklahoma City Public Schools v. Dowell, 498 U.S. 237 (1991) 12

Brown v. Board of Education, 347 U.S. 483 (1954).....11

Castañeda v. Pickard, 648 F.2d 989 (5th Cir. 1981).....7, 8, 9, 10, 11

Flores v. Arizona, 480 F.Supp.2d 1157 (D. Ariz. 2007).....7, 8, 16

Flores v. Arizona, 516 F.3d 1140 (9th Cir. 2008).....9, 10, 16, 17 18

Guadalupe Organization, Inc. v. Tempe Elem. School Dist. No. 3, 587 F.2d 1022 (9th Cir. 1978).....10

Honig v. Doe, 484 U.S. 305 (1988).....11

Jefferson v. Hackney, 406 U.S. 535 (1972).....12

Keyes v. School Dist. No. 1, Denver, Colo., 576 F.Supp. 1503 (D. Colo. 1983) 7

Martin Luther King Jr. Elementary School Children v. Ann Arbor School Dist. Bd., 473 F.Supp. 1371 (E.D. Mich. 1979).....6

McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995).....5

Milliken v. Bradley, 418 U.S. 717 (1974).....14

Milliken v. Bradley, 433 U.S. 267 (1977).....14, 15, 16, 17, 18

TABLE OF AUTHORITIES – Continued

Page

Missouri v. Jenkins, 495 U.S. 33 (1990) 11

Missouri v. Jenkins, 515 U.S. 70 (1995).....12, 14, 15, 16, 17

Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992).....13

San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) 12

Spallone v. United States, 493 U.S. 265 (1990).....12

Teresa P. by TP. v. Berkeley Unified School Dist., 724 F.Supp. 698 (N.D. Cal. 1989) 7

U.S. v. Lopez, 514 U.S. 549 (1995).....11

Valencia Co. v. Wilson, 12 F.Supp.2d 1007 (N.D. Cal. 1998) 7

U.S. CONSTITUTIONAL PROVISION

U.S. Const. amend. XIV 2, 6, 11, 12

STATUTES

20 U.S.C. § 1703 6

20 U.S.C. § 1703(f).....6, 10

20 U.S.C. § 1712 6

RULES

Supreme Court Rule 37(2)(a) 1

Supreme Court Rule 37(6) 1

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Letters from The Federal Farmer to The Republican No. 3 (Oct. 10 1787), *in* 1 *The Debate on the Constitution* (Bernard Bailyn ed., 1993) 5

The Federalist No. 32 (Alexander Hamilton) (Clinton Rossiter ed., 1961) 4

The Federalist No. 81 (Alexander Hamilton) (Clinton Rossiter ed., 1961) 4, 5

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief in support of Petitioner.[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

MSLF is a non-profit, member-supported public interest law firm dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited and ethical government, and the free enterprise system. MSLF's more than 9,000 members include businesses and individuals who live and work in nearly every State, including the State of Arizona. All these persons are vitally interested in the curriculum and funding of the schools where they reside. Moreover, MSLF and its members strongly believe that such curriculum and funding decisions

[1] In compliance with Supreme Court Rule 37(6), MSLF represents that no counsel for any party authored this brief in whole or in part and that no person or entity, other than MSLF, made a monetary contribution to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37(2)(a), the parties have consented to the filing of this brief. Counsel of record for all parties received notice at least ten days prior to the due date of the amicus curiae's intention to file this brief.

should be made on a local level. These decisions should certainly not be made by the federal courts, which have no expertise whatsoever in these matters, nor are the courts intimately familiar with local conditions. Allowing the federal courts to meddle in local school affairs could end innovation designed to improve education for the students in those districts.

MSLF also strongly believes in and actively litigates to promote the concept of federalism and local control. MSLF believes that shared sovereignty of the United States government and the governments of the several States is essential to maintaining a limited and ethical government and is protected by strict adherence to federalism principles. Accordingly, MSLF respectfully presents this brief to argue for these principles in support of Petitioner.

SUMMARY OF THE ARGUMENT

In order to maintain the balance of power established in the federal system, the Framers intended that the federal courts' authority would be limited. Congress was mindful of this principle of federalism when it drafted the Equal Education Opportunity Act ("EEOA"), which gives effect to the Equal Protection Clause of the Fourteenth Amendment in state-run schools. In order to protect the federal structure, Congress limited federal courts' remedial discretion under the EEOA. This Court has also been mindful of the principles of federalism and has protected the

authority of states to regulate their schools, while at the same time ensuring compliance with federal law. The Ninth Circuit did violence to the principles of federalism that this Court has fought to protect and that Congress was mindful of when it drafted the EEOA. By affirming the district court's order requiring Arizona to earmark funding for English Language Learner ("ELL") programs, regardless of the effectiveness of increased funding on meeting the requirements of the EEOA, the Ninth Circuit entangled the federal courts in a dispute that they had no expertise in resolving and disrupted the careful balance of power between the states and the federal government.

ARGUMENT

This Court granted certiorari, in part, to review the Ninth Circuit's apparent disregard for foundational principles of federalism in that court's interpretation of the EEOA. This Court has jealously protected these principles and Congress was mindful of them when it limited federal courts' authority in the EEOA. The shared sovereignty of the United States government and the governments of the several States is protected by strict adherence to federalism principles and is essential to maintaining a limited and ethical government. These principles of federalism are defeated when, as in the instant case, a federal court substitutes its own judgment for that of state and local officials about which funding

choices will best implement a State's educational programs. When the Ninth Circuit ratified the district court's takeover of Arizona's school funding decisions, it stepped outside the power apportioned to the federal courts by the Constitution and the EEOA. This Court should therefore restore the principles of federalism that were damaged by the Ninth Circuit's decision affirming the district court and reverse the judgment of the Ninth Circuit.

I. FEDERALISM IS A CORE COMPONENT OF LIMITED AND ETHICAL GOVERNMENT.

The Framers intended that the federal courts' authority would be limited. Alexander Hamilton characterized the power of the federal courts as "carefully restricted to those causes which are manifestly proper for the cognizance of the national judicature." *The Federalist No. 81*, at 490 (Alexander Hamilton) (Clinton Rossiter ed., 1961). This narrow view of federal judicial power is consistent with the Framers' narrow view of the general federal power. Hamilton explained that federal oppression of state governments would be unlikely because the Constitution protected the "necessity of local administrations for local purposes, [which] would be a complete barrier against the oppressive use of such a [federal] power." *The Federalist No. 32*, at 197 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

These arguments for a limited federal judiciary were offered by the Framers in response to concerns that federal judges wielding both law and equity powers would be unrestrained. As one Anti-Federalist put it, "if the law restrain [the judge], he is only to step into his shoes of equity, and give what judgment his reason or opinion may dictate." Letters from The Federal Farmer to The Republican No. 3 (Oct. 10 1787), *in* 1 *The Debate on the Constitution* 245, 273 (Bernard Bailyn ed., 1993). This colloquy between Federalists and Anti-Federalists suggests that the drafters and ratifiers of the Constitution approved the narrow explanation of the federal judicial power offered in *Federalist No. 81*. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 367 (1995) (Thomas, J., concurring).

As demonstrated below, the courts' role is perhaps most limited by federalism principles in the context of local school funding decisions. The Ninth Circuit ignored this Court's long history of deference to states' authority and improperly took control of the State of Arizona's school funding decisions. Oblivious to this Court's precedent or the text of the EEOA, the district court, in the prescient words of the Federal Farmer, "step[ped] into his shoes of equity, and [gave] what judgment his reason or opinion [ ] dictate[d]." Letters from The Federal Farmer, *supra*. The district court's usurpation of local funding decisions, and the Ninth Circuit's willingness to go along with such usurpation, undermines the important federalism

principles that protect local decision making from federal control.

II. THE NINTH CIRCUIT VIOLATED PRINCIPLES OF FEDERALISM BY CONTROLLING A TRADITIONALLY LOCAL DECISION.

A. THE TEXT OF THE EEOA REQUIRES THAT FEDERAL COURTS HAVE A LIMITED ROLE IN MATTERS OF SCHOOL FUNDING AND MANAGEMENT.

Pursuant to its authority to enforce the Equal Protection Clause of the Fourteenth Amendment, Congress passed the EEOA to ensure that no student was denied "equal educational opportunity." 20 U.S.C. § 1703; *see Martin Luther King Jr. Elementary School Children v. Ann Arbor School Dist. Bd.*, 473 F.Supp. 1371, 1383 (E.D. Mich. 1979). Section 204 of the EEOA requires each state to "take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." 20 U.S.C. § 1703(f). The remedial section of the EEOA codifies an underlying respect for principles of federalism, providing that, "[i]n formulating a remedy for a denial of equal educational opportunity or a denial of the equal protection of the laws, *a court*, department, or agency of the United States *shall seek or impose only such remedies as are essential to correct particular denials of equal educational opportunity* or equal protection of the laws." 20 U.S.C. § 1712 (emphasis added).

The relevant statutory standard "appropriate action" is not defined and no legislative history gives these words context or definition. *See Castañeda v. Pickard,* 648 F.2d 989, 1008-09 (5th Cir. 1981). Therefore, the district court relied on the judicially crafted three-part *Castañeda* test. *Flores v. Arizona*, 480 F.Supp.2d 1157, 1164 (D. Ariz. 2007). The *Castañeda* test requires an educational agency to (1) adopt a recognized educational theory; (2) provide programs reasonably calculated to implement the theory; and (3) show, after a reasonable period of time, that language barriers are being overcome. 648 F.2d at 1009-10. Various courts have employed the *Castañeda* test since 1981. *See Valencia Co. v. Wilson*, 12 F.Supp.2d 1007, 1017-18 (N.D. Cal. 1998), *aff'd*, 307 F.3d 1036 (9th Cir. 2002); *Teresa P. by TP. v. Berkeley Unified School Dist.*, 724 F.Supp. 698, 713 (N.D. Cal. 1989); *Keyes v. School Dist. No. 1, Denver, Colo.*, 576 F.Supp. 1503, 1510 (D. Colo. 1983).

In crafting the three-part test as a framework to evaluate "appropriate action," the *Castañeda* court stated that its intention was to "fulfill the responsibility Congress has assigned to [the courts] without unduly substituting our educational values and theories for the educational and political decisions reserved to state or local school authorities or the expert knowledge of educators." 648 F.2d at 1009. Moreover, the court underscored that Congress's use of the vague standard "appropriate action" meant that state and local authorities were to have a "substantial amount of latitude in choosing the programs

and techniques they would use to meet their obligations" under Section 204 of the EEOA. *Id*. at 1009. Additionally, the *Castañeda* court observed that the lack of Congressional guidance forced the court to prescribe standards, although it was "ill equipped to do so" because that task was better "reserved to other levels and branches of government." *Id.* The *Castañeda* court's reluctance to step into the shoes of school administrators was well advised given the limitations placed on federal courts by the remedial section of the EEOA .

Notably, neither the *Castañeda* test nor the EEOA allows federal courts to judge the adequacy of state action to overcome language barriers on the basis of funding, as the district court did here. *See Flores*, 480 F.Supp.2d at 1167. Rather, the *Castañeda* test acknowledges that the EEOA requires only "a genuine and good faith effort, consistent with local circumstances and resources, to remedy language deficiencies." 648 F.2d at 1009.

Here, the Ninth Circuit scarcely inquired as to the genuineness of Arizona's efforts to meet the needs of ELL programs in the Nogales Unified School District ("NUSD"), nor did it consider the limitations of local circumstances and resources with which state and local officials must contend in ensuring compliance with the EEOA. *Flores*, 480 F.Supp.2d at 1167. In a world of unlimited resources the Ninth Circuit's demand for more money for ELL would be of no mind; but in the real world in which state and local school officials must work, resources are limited

and educators must be adept at making the most of whatever resources they can muster. Indeed, when NUSD administrators worked wisely with the resources available to them, the school district made great strides in reducing class size, improving educational materials, hiring high-quality teachers, and firing unsuccessful teachers. *Flores v. Arizona*, 516 F.3d 1140, 1156-57 (9th Cir. 2008) ("Using careful financial management and applying for 'all funds available,' [former NUSD Superintendent Kelt] Cooper was able to achieve his reforms with limited resources."). The facts of this case show that money does not equal progress in public education. Yet, the Ninth Circuit focused only on the level of funding the State of Arizona earmarked for ELL, not on the progress NUSD had made in improving conditions for ELL. *Flores*, 516 F.3d at 1161. Evidence was presented showing that the Scottsdale Unified School District spends substantially more money than does NUSD for its ELL students and maintains an incredible class size ratio of 10:1, yet Scottsdale's ELL 10th graders score worse on Arizona's academic achievement tests than do NUSD's ELL 10th graders. Pet. for Cert. 15 (citing TE 12; TE 7, p. 3; TE 219; TE 245; Tr. Day 6, p. 12). Losing sight of the purpose of the EEOA, the district court abandoned the performance-based standards of the *Castañeda* test and ignored the narrow focus of the EEOA. The district court thereby exceeded the limited role the EEOA provides for federal courts by entangling the court in local school-funding decisions.

The Ninth Circuit declined to overturn the district court ruling, despite the fact that the Ninth Circuit has acknowledged the weak role federal courts play in the statutory scheme of the EEOA. In *Guadalupe Organization, Inc. v. Tempe Elem. School Dist. No. 3*, 587 F.2d 1022, 1030 (9th Cir. 1978), the Ninth Circuit noted that there is "very little legislative history" for § 1703(f) of the EEOA and that there had been no decision interpreting the "appropriate action requirement" of § 1703(f). Consequently, the *Guadalupe Organization* court was unwilling to require a school district to provide bilingual education, as the plaintiffs would have preferred. *Id*. Instead, the court recognized that it must "adhere closely to the ordinary meaning" of the statute's language and held the school district to be in compliance with the EEOA because it had taken action to remedy language deficiencies. *Id*. Yet, in the instant case the Ninth Circuit boldly issued a ruling that endorsed federal usurpation of state authority over nuanced school-funding decisions, even though the "ordinary meaning" of the EEOA gives the district court no such authority. *Flores*, 516 F.3d at 1180. In so doing, the Ninth Circuit mandated an infusion of earmarked funding completely unconnected to any violation of the EEOA and provided no evaluation of the need for – or educational benefits that would result from – increasing earmarked funding.

The Ninth Circuit also ignored the fact that the EEOA is not a funding statute, but rather a performance statute. *See Castañeda*, 648 F.2d at 1009-10.

If Arizona, through good-faith efforts at oversight and technical expertise, ensures that NUSD's students have a reasonable opportunity to learn English, no more is required. *Castañeda*, 648 F.2d at 1009. Respect for federalism, as codified in the remedial section of the EEOA, should have caused the Ninth Circuit to at least measure the need for and effectiveness of the district court's preferred remedy before it affirmed usurpation of Arizona's authority to manage its own schools.

B. THIS COURT'S PRECEDENT REQUIRES THAT FEDERAL COURTS HAVE A LIMITED ROLE IN MATTERS OF SCHOOL FUNDING AND MANAGEMENT.

This Court has long recognized that public school administration is "perhaps the most important function of state and local governments." *Honig v. Doe*, 484 U.S. 305, 309 (1988) (quoting *Brown v. Board of Education*, 347 U.S. 483, 493 (1954)). In particular, "no matter has been more consistently placed upon the shoulders of local government than that of financing public schools." *Missouri v. Jenkins*, 495 U.S. 33, 51-52 (1990). Although the Fourteenth Amendment changed the balance of power between the States and the federal government, it remains "well established that education is a traditional concern of the States." *U.S. v. Lopez*, 514 U.S. 549, 580 (1995) (Kennedy, J., concurring). Moreover, federal interference with the educational decisions of the states raises serious federalism concerns. *Id*. In order to maintain the

restraints on equity power that the federal system provides, federal courts must be mindful of their limited role in crafting equitable remedies that invade the states' independence. *See Missouri v. Jenkins*, 515 U.S. 70, 132 (1995) (*Jenkins II*) (Thomas, J., concurring).

This Court has been especially mindful of federalism principles in cases involving school funding. *See, e.g., Jenkins*, 515 U.S. at 99; *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 42 (1973). Although the EEOA creates an affirmative obligation on schools to overcome language barriers, this Court has acknowledged that states can take many routes to provide funding for public schools. In rejecting an Equal Protection claim against Texas's school funding system, this Court noted that, "[t]he very complexity of the problems of financing and managing a . . . public school system suggests that 'there will be more than one constitutionally permissible method of solving them,' and that . . . 'the legislature's efforts to tackle the problems' should be entitled to respect." *Rodriguez*, 411 U.S. at 42 (quoting *Jefferson v. Hackney*, 406 U.S. 535, 546-47 (1972)). This deference to local decision making is consistent with this Court's recognition of the limits of federal power in other contexts.

For example, in *Spallone v. United States*, 493 U.S. 265, 272 (1990), this Court struck down a series of steep fines against members of a City Council because the district court failed to "exercise the least possible power adequate to the end proposed." Similarly, in *Board of Education of Oklahoma City Public*

Schools v. Dowell, 498 U.S. 237 (1991), this Court affirmed the proposition that when a constitutional violation has been rectified, judicial oversight should end. Once again, in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), this Court reversed a district court's refusal to modify a consent decree to allow double bunking in jail cells. In so doing, this Court admonished lower courts to be flexible in tailoring modifications to consent decrees in institutional reform litigation and to be mindful of financial constraints in devising a remedy. *Id*. at 392-93. These cases illustrate the restraint federalism principles must exert on federal courts, lest the federal judiciary lose respect for the allocation of powers within the federal system. Deference to the expertise of local and state governments, which bear the burden of measuring and curing problems of institutional reform, is essential if the principles of federalism are to have any practical effect on the balance of power between the state and federal governments.

Even in the highly charged area of public school desegregation, this Court has admonished lower courts to be mindful of the federal courts' limited role and to exercise discretion when their judgments invade the authority of local leaders. In narrowing an interdistrict remedy to intradistrict segregation, this Court was guided in its decision by acknowledgment of the fact that, "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools

and to quality of the educational process." *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974) (*Milliken I*). In addition, this Court has long recognized that "local autonomy of school districts is a vital national tradition, and that a district court must strive to restore state and local authorities to the control of a school system operating in compliance with the Constitution." *Jenkins*, 515 U.S. at 99 (citations omitted).

In *Jenkins* this Court overturned a comprehensive judicial remedy directing the state to spend massive amounts of money. *Id*. at 77-78. In so doing, this Court rejected the district court's imposition of various interdistrict remedies intended to attract "white" students from the suburbs to desegregate an urban school district because such a remedy lacked a sufficient nexus to the intradistrict violation. *Id*. at 94-95. In *Jenkins*, this Court also reaffirmed the three-part framework from *Milliken v. Bradley*, 433 U.S. 267 (1977) (*Milliken II*), to guide district courts in devising desegregation remedies. That framework established that a judicial remedy must: (1) be determined by the nature and scope of the violation of federal law, *i.e.*, the remedy must be directly related to the violation; (2) be remedial in practice; and (3) take into account the interests of state and local authorities in managing their own affairs. *Jenkins*, 515 U.S. at 88-89. Thus, *Jenkins* confirmed the principle that a remedy must be sufficiently tailored to cure the violation of federal law, without unnecessarily invading a state's authority to regulate its schools. *Id*.

Importantly, Justice Thomas, in his concurring opinion, offered useful wisdom on the proper role of federal courts in matters of school reform. Raising deep concerns about the "extravagant uses of judicial power," he elaborated on the third prong of the *Milliken II* framework:

> Federal judges cannot make the fundamentally political decisions as to which priorities are to receive funds and staff, which educational goals are to be sought, and which values are to be taught. When federal judges undertake such local, day-to-day tasks, they detract from the independent dignity of the federal courts and intrude into areas in which they have little expertise. But I believe that we must impose more precise standards and guidelines on the federal equitable power, not only to restore predictability to the law and reduce judicial discretion, but also to ensure that constitutional remedies are actually targeted toward those who have been injured.

515 U.S. at 133.

The Ninth Circuit would have done well to heed Justice Thomas's wisdom. Instead, it ignored the deeply rooted principles explored above and dictated how the State of Arizona should allocate scarce educational resources. In ruling that the State must create an earmarked funding source for the "incremental costs" of ELL education, the Ninth Circuit not only misconstrued the requirements of the EEOA, it also supplemented its own judgment for that of the

NUSD and state education administrators. The Ninth Circuit gave short shrift to the improvements NUSD has achieved through diligent management practices because these improvements "are due to NUSD's own management improvements, not reliable or sufficient funding." *Flores*, 516 F.3d at 1161 (citing *Flores*, 480 F.Supp.2d at 1160). In other words, the Ninth Circuit would not consider NUSD in compliance with the EEOA until the State had complied with the district court's demand for additional funding, regardless of whether additional funding was necessary to meet the EEOA's requirement of overcoming language barriers.

By downplaying the improvements made through NUSD's enhanced management practices, the Ninth Circuit effectively refused to allow the State to prove that the purpose of the EEOA could be fulfilled without the intrusive involvement of the district court. *Flores*, 516 F.3d at 1161. The Ninth Circuit's inflexible approach fails each prong of the *Milliken* test and transforms the federal courts into adjunct administrators of Arizona's school districts.

First, the district court's remedy was only tangentially related to the alleged violation of the EEOA because the EEOA is a performance statute, not a funding statute. *See Milliken II,* 433 U.S. at 280. The Ninth Circuit all but severed this tangent by overlooking the progress NUSD had made. *See Flores*, 516 F.3d at 1161.

Second, because the alleged violation of the EEOA was not properly confined to the adequacy of NUSD's performance in overcoming language barriers, the remedy mandating ever increasing funding was inherently not remedial in practice. *See Milliken II,* 433 U.S. at 274; *Flores*, 516 F.3d at 1179-80. Moreover, the record reflects this disconnect between violation and remedy. Evidence was presented that educational outcomes have little to no relationship to increased funding. Scottsdale Unified School District spends substantially more money for its ELL students than does NUSD and maintains an incredible class size ratio of 10:1, yet its ELL 10th graders score worse on Arizona's academic achievement tests than do NUSD's ELL 10th graders. Pet. for Cert. 15 (citing TE 12; TE 7, p. 3; TE 219; TE 245; Tr. Day 6, p. 12).

Third, the Ninth Circuit refused to take into account the interests of state and local authorities in managing their own affairs, *see Milliken II,* 433 U.S. at 280-81, despite the fact that it recognized that "the current structure of this litigation is placing the federal judiciary in the uncomfortable position of mediating between state officials with regard to the execution of an obligation of the state as a whole." *Flores*, 516 F.3d at 1165. The Ninth Circuit also acknowledged that the political process was the correct forum to work out the funding disputes that gave rise to the litigation. *Id*.

Nevertheless, the Ninth Circuit ignored its own admonition, and those expressed by Justice Thomas in *Jenkins*, it ignored record evidence regarding the

questionable effectiveness of increased funding, and it ignored the performance-based standards of the EEOA. *Flores*, 516 F.3d at 1179-80. By running roughshod over the *Milliken* test, the Ninth Circuit entangled the federal courts in a dispute that they had no expertise in resolving. In the process the Ninth Circuit did violence to the principles of federalism that this Court has fought to protect and of which Congress was mindful when it limited the federal courts' authority to craft remedies under the EEOA.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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